

SHAREHOLDER DISPUTES AND DERIVATIVE LITIGATION



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99% of American investors own stock in companies that aren't registered on Wall-Street. Private companies are what drive the American economy and can create tremendous wealth for their investors. One of the tremendous advantages of a private company is that things can be managed efficiently and privately. Generally private companies are able to operate smoothly when business is going well. Even still, shareholder disputes may arise over matters such as company control, breach of fiduciary duties, corporate conflicts of interests, or dividend distributions. Ultimately, at their core, disputes arise amongst shareholders when a shareholder believes their rights have been violated, business management made a poor decision, or business operations reach an impasse. Shareholder disputes are never good for business and even worse when businesses are underperforming. This is particularly true for private companies whose investors are unable to sell their stock on an open market.

Conflicts between shareholders of a private company can bring business operations to a screeching halt. Businesses and their owners will almost always require separate representation during a dispute to avoid conflicts of interest and reach a resolution efficiently. However, shareholders will often first try to settle things amongst themselves. Unfortunately, such negotiations frequently only amplify the problems and result in further divide. Additionally, prolonged unsuccessful negotiations only increase the businesses exposure to potential liabilities and create negative publicity. Settling a business dispute effectively and efficiently is in the best interest of the business and its shareholders.

Jimerson Birr Shareholder Dispute Services

Jimerson Birr offers shareholder dispute resolution services to both businesses and shareholders. Our firm specializes in all aspects of business law and can advise on any dispute which arises from a corporation, LLC, or partnership. Our attorneys understand the operational complexities associated with different industries and possess the legal expertise and litigation experience necessary to protect your interests. Our attorneys have drafted and reviewed countless business formation documents and can recognize issues that trigger remedies under both state and federal law. With your best interests in mind, our attorneys will explore all cost-effective avenues of business dispute resolution, including all forms of alternative dispute resolution. When shareholder disputes occur, let our firm diligently represent your interests from the beginning and help you efficiently reach an outcome in line with your personal and business objectives.

Our firm represents clients in a variety of shareholder and business disputes including:

- > Access to books and records
- > Appraisal rights
- > Board elections
- > Breach of the Articles of Incorporation, Membership Agreement, or Partnership Agreement
- > Breach of a fiduciary duty by an officer, director, or manager
- > Breach of Shareholder Agreements
- > Business dissolutions and liquidations
- > Business spending
- > Business direction
- > Business litigation
- > Buy-Sell Agreements
- > Buyout agreements
- > Closely held companies and family-owned business-related disputes
- > Conflict of interest transactions
- > Corporate Formation, Transactions and Dissolution
- > Corporate and Board of Directors Governance and Operations
- > Director/Officer self-dealing transactions
- > Disagreement over shareholder rights
- > Executive coaching
- > Executive compensation issues
- > Fraud and fraud in the inducement

- > Freeze-out actions
- > Indemnification
- > Insider Trading allegations
- > Loss of business value due to fraud or mismanagement by officers or directors
- > LLC member rights
- > Mergers and Acquisition disputes
- > Minority Shareholder rights violations
- > Minority Shareholder vs. Majority Shareholder challenges
- > Misappropriation or embezzlement of company funds
- > Negligent misrepresentation
- > Partner rights
- > Self-dealing by officers, directors or key executives
- > Shareholder derivative lawsuits
- > Shareholder dividend or partnership distribution disputes
- > Shareholder voting issues
- > Trade secret protection
- > Voting rights and voting deadlocks
- > Waste or mismanagement of company assets

Shareholder Derivative Litigation

To prevent abuses by corporate management, courts across the country have recognized the rights of shareholders to bring derivative actions. Though real-world mixing of motives prove this maxim to be imperfect, a shareholder who initiates a shareholder's derivative action is a fiduciary to a company seeking to act in its best interests. At a fundamental level, when shareholder derivative claims are filed, they are represented as an action against directors or officers of the company for violating their most basic obligations to act in good faith, for the benefit of the company, and exercising the responsibilities of the office they impliedly or expressly undertook to give the enterprise the benefit of their best care and judgment, exerting their powers solely in the interest of the company. In discharging duties, corporate directors and officers must uphold both their duties of care and loyalty. When said duties are derelict or breached, shareholder derivative actions arise.

In addition to the potential causes of action a minority shareholder may have as a result of controlling management's breach of fiduciary duties, claims may be brought for violation of other status rights, voting rights, economic rights, or rights to access corporate information. These claims may be direct or derivative, depending on the nature of the right asserted and the harm imposed. Shareholder derivative actions allow those who have an ownership stake in the company to hold the wrongdoers accountable for corporate misdeeds. When shareholder derivative suits are most effective, they are effective because of a focus upon reforming past misconduct, making the company whole, protecting investment through internal change, and improving the governance practices of the company to ensure misconduct does not become the culture. Often the short-term goal for shareholder derivative actions are to stop the offensive conduct and repair the damage caused, remove the officers or directors who violated their duties, and to obtain financial relief for the amount the company was damaged.

Plaintiff's Shareholder Derivative Representation

Jimerson Birr's litigators work diligently to improve the investments and relationships of those who have been damaged by corporate mismanagement and malfeasance. As lawyers who have served derivative plaintiffs and defendants, we have a robust understanding of the responsibilities of the leadership of a company, and we will thoroughly pursue the poisonous parties and evidence needed to hold them accountable. We handle a broad spectrum of litigation involving shareholder derivative claims, including, but not limited to:

- > Claims against corporations, directors and/or officers for defrauding stockholders by inflating revenue
- > Claims against corporations, directors and/or officers for failing to disclose all pertinent facts that affect the value of stock
- > Claims against corporations, directors and/or officers for dereliction of duties, self-dealing, fraud or misappropriation of funds or assets
- > Claims against corporations, directors and/or officers for corporate mismanagement
- > Claims against corporations, directors and/or officers for breach of fiduciary duty
- > Claims against corporations, directors and/or officers for improper relinquishment of assets
- > Claims against corporations, directors and/or officers for refusing shareholder access to books and records
- > Claims against corporations, directors and/or officers for improper conflicts of interest
- > Claims against corporations, directors and/or officers for improper withholding of dividends
- > Claims against corporations, directors and/or officers for shareholder voter suppression

Clients of all categories, including investors in public or private companies, institutional investors, consumers, employees, whistleblowers, and group funds, choose Jimerson Birr because of our ferocious commitment, positive past performance and aggressive approach to litigation. Shareholder derivative litigation partnership with Jimerson Birr is a crucial step to ensuring that high-impact corporate governance reforms to protect shareholder rights are no longer an illusion and evasive pipe dream. Our lawyers are committed to the cause of preventing corporate mismanagement. If you are a shareholder who suspects fraud, illegality, abuse, or other abhorrent behavior that is damaging to the company you've invested in, contact Jimerson Birr today.

Corporate Defendant or D&O Shareholder Derivative Representation

Laws across the country are designed to ensure only the most legitimate shareholder suits continue through the legal process. Under federal and state laws and procedures, plaintiff shareholders must make a demand on the board of directors before filing a derivative suit. These pre-suit demands outline the harms the company is currently suffering from as a result of action or inaction by the board and executives and give the company an opportunity to address the issue. By making a formal demand on the company, shareholders seek to compel that company to sue its officers and directors, auditors, partners, subsidiaries, and anyone else who allegedly damaged the company. In the demand, the plaintiff must be able to state particular facts raising a reasonable doubt that the board or management used appropriate business judgment in deciding to act or not to act on the matter in question. Though the standards are typically difficult to meet, directors cannot stand neutral—they must act.

Jimerson Birr attorneys are adept at cutting straight to the core of the dispute and advising the board on a course of conduct that addresses the grievances. Our lawyers work with the board in deciding whether it wants to act as a whole in reviewing a shareholder's demand, or whether it chooses to appoint a committee to investigate the facts underlying a demand and make a

report and recommendation regarding the threatened suit. If a special litigation committee is appointed, Jimerson Birr will work with the company to ensure that the decisions of special litigation committees will not be challenged as being bereft of independence or good faith of the committee members, or the result of an unreasonable investigation. Our lawyers work with the company to ensure that special litigation committees are vested with independent and disinterested directors, empowered by full and unconditional authority to act on behalf of the board to investigate the allegations and to determine if litigation is in the company's best interest.

To the extent appropriate, Jimerson Birr attorneys will work with the derivative claimant to enter into a memorandum of understanding establishing preliminary settlement terms and ultimately a settlement agreement resolving the dispute. We will work amicably with all parties (and the Court if in litigation) for the good of the company to address terms that pertain to a payment to the corporation or its shareholders, modification or abandonment of a corporate transactions, or corporate governance reforms. We will then assist the company in providing the best notice practicable to the shareholders. As a remedial or preventive measure, our lawyers will work with the company to ensure its operations are insulated from future disruption and derivative liability exposure through incorporating policies that limit liability, promote full indemnity, and fully insure directors and officers. Disputes between shareholders can lead to serious legal complications. Unless they are dealt with quickly and effectively, these disputes could bring about the demise of a company.

As often happens with derivative claims, the board or special litigation committee finds that the claim is spurious or not in the best interests of the company to pursue. There are too many reasons to count as to why a supportable decision to abandon the claim can be made. If the board decides the claim is not worth pursuing, but the original shareholder still believes the claim is valid, they could decide to file suit individually, without the backing of the corporation. Continuing the suit individually without the backing of the corporation always presents a significant risk for the original shareholder. When claims are unfounded, or the disgruntled shareholder is simply using the derivative process to gain improper corporate leverage, Jimerson Birr lawyers will vigorously defend the company or falsely maligned directors or officers.

The chief defense in derivative litigation is often the "business judgment rule." So long as directors or officers in a business are acting in good faith, in the best interests of the business, on an informed basis, as prudent stewards of corporate resources and not compromising duties of loyalty and care, the management of the business will be shrouded by the business judgment rule. In effect, the business judgment rule creates a strong presumption in favor of the board of directors of a corporation, freeing its members from possible liability for decisions that result in harm to the corporation. Courts across the country have held that corporate directors and officers generally have wide discretion in the performance of their duties, such that the courts will not attempt to impose liabilities for the mere exercise of permissible business judgment. The rule encompasses a broad set of public policy designed to avoid judging in hindsight the wisdom of business decisions that are made under the pressures of day-in, day-out commercial relations. In an age of prevalent shareholder derivative lawsuits for breach of fiduciary duty, Jimerson Birr attorneys will work with the company to explore a procedural dismissal of the case at the early stages of pleading, or pursue fact base disposition of the case up through, and including, a trial on the merits. The business judgment rule is just one tool that our team uses in its tool kit. Jimerson Birr attorneys fully understand that derivative claims and investigations can be disruptive, costly, and divisive to a company's leadership, board, officers, owners and stakeholders. By deploying an active approach to issue diagnosis and resolution, we can triage a derivative lawsuit and provide innovative strategic options to fit the desired approach of the company—especially when that preference is to provide an aggressive defense.

Our clients look to us to bring a distinctively high degree of quality, passion and creativity to resolve their business disputes effectively and cost-efficiently. We draw on the strength of our character and talents to deliver the best of our firm to every client through true collaboration. We don't confuse effort with results, and we focus on the immutable, allied goals at all times. Partnership with Jimerson Birr means that you are not looking in any direction but ahead.

Attorneys



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